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Comptroller General
of the United States

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Washington, D.C. 20548

Decision

Matter of: Delta Data Systems Corporation

File: B-260791

Date: July 21, 1995

Karl G. Feissner, Esq., Feissner & Slatkin, for the protester.
Keith Moore-Erickson, Esq., Maryland Procurement Office, for the agency.
Christina Sklarew, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging improper evaluation of price proposals is denied where the record shows that the evaluation methodology that the agency employed was consistent with the terms of the solicitation.
2. Contracting agency may properly accept a proposal that includes an item priced below cost from a responsible offeror where there is no showing that the offeror's method of distributing costs to line items distorts its unit prices.

DECISION

Delta Data Systems Corporation protests the Maryland Procurement Office's evaluation of price proposals under request for proposals (RFP) No. MDA904-94-R-9063 and the resulting award to NAI Technologies. Delta contends that the evaluation was based on a formula that was inconsistent with the terms of the RFP.

We deny the protest.

The RFP contemplated the award of a 4-year indefinite delivery, indefinite quantity contract for Tempested Sun SPARC workstations, consisting of rackmountable processors, monitors, keyboards, mouse, and tempested peripherals. Offerors were instructed to submit separate technical and price proposals, which would be separately evaluated. The RFP, as amended, listed six items in its schedule; price proposals were to include a unit price for each item. In the evaluation and source selection, technical factors would

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account for 65 percent of the score, and cost would account for the remaining 35 percent. The RFP provided that award would not necessarily be made to the offeror proposing the lowest price, but would be based on a "best value" determination.

The RFP did not provide guaranteed minimum quantities as numbers of items that would be procured, but instead provided (in Section H.8) dollar amounts for each contract line item number (CLIN) to represent the minimum purchase that would be guaranteed under the contract. The RFP's proposal preparation instructions for price proposals referred offerors to that section in the RFP and instructed offerors to "propose unit prices and the associated quantity within the dollar limitation provided for CLINs 0001 through 0006." Offerors were advised that the number of units proposed for CLINs 0003, 0004, and 0005 should be proportional to the number of items proposed for CLIN 0001, and that the "ratio should be 4 to 1. (Four SPARC stations in the offered version for every one Tempest CD-ROM Drive, every one Tempest 150 Mbyte Tape Drive and every one Tempest 8mm Tape Drive.)"

The RFP provided an evaluation formula to demonstrate how price scores would be calculated. For each of the CLINs, the lowest unit price proposed would be divided by the price proposed by the offeror being scored, to arrive at a score reflecting the offeror's relative price position for that CLIN. For CLIN 0001 (the workstation), that number would then be multiplied by .75, and for each of the remaining CLINs, the number would then be multiplied by .05. Thus, the workstation price score would account for 75 percent of the total price score, and each of the remaining 5 CLIN scores would account for 5 percent.

Ten firms submitted initial proposals. After these were evaluated, discussions were held, and best and final offers (BAFOs) were requested and submitted. NAI's proposal received the highest technical and price scores and was selected as the best value. After learning that the contract had been awarded to NAI and being debriefed, Delta filed a protest with the agency, arguing that under the evaluation scheme established in the RFP, Delta's own proposal would have been lower in price. In addition, Delta argued that the price NAI offered for CLIN 0004 was below cost and allegedly violated Federal Acquisition Regulation (FAR) § 52.215-26, which governs the integrity of unit

ratio (four workstations, or CLINs 0001 and 0002, for every one of the remaining CLINs), its own price would have been low. However, Delta has apparently misread the solicitation; the RFP simply does not state that price proposal scores will be calculated in this manner. The RFP gives the exact formulas that are to be applied to each CLIN in calculating the price scores, as stated above; these do not allow for the analysis Delta is advocating. Our review of the record shows that the price scoring methodology that the agency employed was entirely consistent with the RFP. Furthermore, Delta's transfer of figures from its BAFO is again inaccurate; even using the suggested analysis, when Delta's actual BAFO prices are used in the calculations, Delta's price is higher than NAI's.

Delta also protests that NAI's pricing for CLIN 0004 is below cost, and therefore violates FAR § 52.215-26. This provision requires that offerors distribute costs within contracts on a basis that ensures that unit prices are in proportion to the item's base costs and, therefore, prohibits methods of distributing costs to line items that distort unit prices. As the agency notes, by its terms this provision does not apply to procurements of commercial products. FAR § 52.215-26(b). The agency states that the items at issue are commercial products, and the protester does not dispute this assertion.

In any event, to set aside an award of a contract under FAR § 52.215-26, the protester must demonstrate that it was prejudiced by the awardee's pricing methods. Integrated Protection Sys., Inc., B-229985, Jan. 29, 1988, 88-1 CPD ¶ 92. Delta has made no attempt to demonstrate how the awardee's pricing could have resulted in its obtaining any unfair competitive advantage, or could have been prejudicial to other offerors, nor is such a result apparent to us in these circumstances.³ Accordingly, we find the deviation, if any, without significance. Id. Moreover, to the extent Delta is arguing that NAI's offer for this line item is below cost, there is nothing legally objectionable about a contracting agency accepting a below-cost proposal from a responsible offeror. Environmental Technology Corp., B-225479.3, June 18, 1987, 87-1 CPD ¶ 610. So long as the contracting agency has a bona fide belief that the offeror will be able to perform under the contract, it is free to accept a below-cost offer. Id.

Delta also contends that the agency report revealed that the agency engaged in ex parte communications with NAI when it

³In fact, it appears that Delta itself prepared its without regard to the language of the provision, submitted a price of \$0.00 for CLIN 0006.

participated in a telephone conference on January 4, 1995. The record shows that after initial proposals were evaluated, the agency determined that it would be necessary to conduct discussions with the offerors in the competitive range. Written discussion questions were sent to these offerors, including NAI and Delta, on December 15 and December 23. Because NAI had a number of questions concerning the agency's request for additional information, the agency arranged a telephone conference between agency and Delta personnel on January 4. On January 9, the agency requested BAFOs from each offeror. These were submitted on January 11.

When discussions are held in a negotiated procurement, offerors must be given an equal opportunity to revise their proposals. The content and extent of discussions are matters within the discretion of the contracting officer, however, and discussions with each offeror need not be identical; rather, a procuring agency should tailor its discussions to each offeror since the need for clarification or revision will vary with the proposals. AmerInd, Inc., B-253751, Oct. 19, 1993, 93-2 CPD ¶ 240.

Here, Delta does not provide any specific grounds to support its allegation that the telephone conference was improper. Discussions were held with all competitive range offerors, who were then given an opportunity to submit BAFOs. Furthermore, it is clear that even if there were some level of inequality in the discussions that were held, no competitive prejudice resulted, since the relative standing of technical proposals did not change when BAFOs were evaluated. NAI's technical proposal had the highest score throughout the procurement.

The protest is denied.

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for Robert P. Murphy
General Counsel